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Attorneys for Defendant National Strength &
Conditioning Association

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 CROSSFIT, INC., a Delaware
4 corporation,

5 Plaintiff,

6 v.

7 NATIONAL STRENGTH AND
8 CONDITIONING ASSOCIATION, a
Colorado corporation,

9 Defendant.

CASE NO. 14cv1191-JLS(KSC)

**SECOND JOINT MOTION TO
EXTEND DISCOVERY DATES**

Judge: The Honorable Janis L.
Sammartino

The Honorable Karen S.
Crawford

Courtroom: 4A

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12 Pursuant to the Chamber Rules and Civil Pretrial Procedures of the
13 Honorable Karen S. Crawford (the “Chamber Rules”), Plaintiff CrossFit, Inc.
14 (“CrossFit, Inc.” or “Plaintiff”) and Defendant National Strength and Conditioning
15 Association (“NSCA” or “Defendant”) hereby jointly petition the Court to extend
16 the deadlines for discovery set out in the January 22, 2015 Amended Scheduling
17 Order Regulating Discovery and Other Pre-Trial Proceedings (Dkt. No. 34) (the
18 “Amended Scheduling Order”) and for such other measures as the Court deems
19 appropriate in order to complete fact discovery in this matter.

20 Per the Amended Scheduling Order, fact discovery is due to close on July
21 17, 2015, having been extended by order of this Court following a joint motion to
22 extend filed on January 13, 2015. However, many of the reasons for that first
23 extension remain at issue now: various discovery disputes between the parties
24 remain unresolved, which leaves open the potential for additional document
25 productions once these disputes are resolved. At the same time, the parties have
26 been hesitant to schedule certain depositions while issues related to document
27 discovery remain unresolved because, if additional documents are produced, those
28 depositions (including third party depositions) may need to be reopened.

Therefore, the parties have conferred and believe an additional expansion of the current schedule is required to allow the parties to complete fact discovery in good order.

A. Background

This case turns on the publication of an article written by Dr. Steven Devor and others (the “Devor Article”) in Defendant’s Journal of Strength and Conditioning Research (the “JSCR”). The Devor Article purports to find a high rate of injury observed in a ten-week study of CrossFit participants. *See* Compl. (Dkt. No. 1) ¶¶ 40-42. Plaintiff contends that the findings reported in the article were false, and that the NSCA, which exercised editorial control of the journal and its contents, knew of this error and failed to correct it. *See id.* ¶¶ 49-52. Defendant contends that the authors of the study stand by the accuracy of the article, and that the article in question was authored by independent researchers and was the subject of a “rigorous peer-review process.” Rule 26 Statement (Dkt. No. 18) at 3-4.

As set out more fully in the parties’ first Joint Motion to Extend Discovery Dates (Dkt. No. 33) and supporting declaration of Paul A. Serritella (Dkt. No. 33-1), both filed on January 13, 2015, the parties have engaged in discovery since the commencement of this action. Early on, the parties conferred on discovery schedules, electronic data standards and a confidentiality order. After various conferences with the Court, an initial Scheduling Order was entered on October 3, 2014 (Dkt. No. 24.) The parties also exchanged discovery requests and responses and objections thereto, and met and conferred in an effort to resolve any areas of disagreement. However, the following points of dispute remain unresolved:

- Whether Defendant may withhold the identities of the individuals who reviewed the Devor Article on the basis of a “peer review” privilege;
- Whether Defendant must disclose the compensation the NSCA paid to the editors of the Devor Article, who Plaintiff contends

were involved in causing the false statements to be included therein;

- Whether Defendant must produce documents in the production format to which the parties stipulated and that is specified in the Court's August 27, 2014 Order Regarding Electronic Discovery (Dkt. No. 17), including the production of metadata and the production of unitized documents that have yet to be provided;
- Whether Defendant must produce documents related to its financial projections and business plans related to its revenues from licensing, certification and other activities;
- Whether Defendant has conducted a reasonable search of its own files, and those of its agents – the editors of the Devor Article – for responsive documents.

These issues were submitted for resolution in a series of Joint Motions filed on November 3, November 17 and December 18, 2014.¹ *See* Joint Motion (Dkt. No. 25); Joint Motion (Dkt. No. 30); Joint Motion (Dkt. No. 32).² These motions remain pending at present. If the Court grants these motions, Defendant (and perhaps certain third-parties) will be required to produce additional documents that Plaintiff believes are critical to discovery in this case.

Because of the aforementioned discovery issues, the parties have not yet been able to conduct certain depositions to which the documents in question would be relevant.³ As set out in the January 3 Joint Motion, Plaintiff seeks roughly

¹ To date, Defendant has not raised issues to the Court with Plaintiff's responses and objections.

² On April 20, 2015, Plaintiff moved to remove the confidentiality designations of certain documents. *See* Joint Motion (Dkt. No. 51). That Joint Motion is unlikely to have an effect on the discovery schedule.

³ On March 10 and March 13, the parties took the depositions of Dr. Michael M. Smith and Dr. Steven Devor, the principal authors of the Devor Article. Serritella Decl. ¶ 2.

1 twenty depositions of witnesses with relevant information. Given both the number
2 of likely deponents and the fact that those deponents reside all across the country
3 and internationally, the parties anticipate that discovery will take months to
4 complete in its entirety.

5 Faced with these various pending issues and the potential need for additional
6 discovery, the parties recently conferred regarding how to move the discovery
7 forward in the most efficient manner. Serritella Decl. ¶ 3. Thereafter, the parties
8 contacted chambers on May 6, 2015 to request a case management conference
9 pursuant to Chambers Rule II.C in an effort to seek guidance from the Court on
10 how to proceed. Serritella Decl. ¶ 4. The parties were told to submit a written
11 request for an extension in the form of a joint motion. Serritella Decl. ¶ 4. The
12 present joint motion follows.

13 **B. DISCUSSION**

14 Rule IV(C) of the Chamber Rules requires the parties to petition the Court
15 for an extension of the discovery deadlines, which will be granted upon a showing
16 of good cause. Here, the parties have conferred and believe that good cause exists
17 to extend the present schedule in light of the issues outlined above.

18 As set out above, numerous discovery disputes remain pending between the
19 parties, which (should they be granted) would require additional document
20 collection, review, and production by the Defendant, and potentially by third
21 parties. The parties believe the resolution of these issues is a necessary first step to
22 any substantial advancement of the discovery process.

23 Once the issues outlined above are resolved, the parties anticipate that
24 scheduling and conducting depositions may be time-consuming and complex. The
25 witnesses in this matter do not reside in any one part of the country, and counsel
26 will be required to travel extensively to complete depositions. Even if depositions
27 were to begin immediately, the parties believe they could require months to
28 complete.

Therefore, the parties request that the Court extend fact discovery until October 30, 2015, and extend all later dates by an equivalent duration, to enable a full and complete fact discovery process.

The parties are amenable to a conference at the Court's convenience to discuss the request for relief set out herein, or any other issue related to the scheduling of discovery.

Respectfully submitted,

Dated: May 14, 2015

LATHAM & WATKINS LLP

MANNING & KASS, ELLROD,
RAMIREZ, TRESTER LLP

By: /s/ Paul A. Serritella
Paul A. Serritella
(*pro hac vice*)

By: /s/ Kenneth S. Kawabata
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*Counsel for Plaintiff CrossFit,
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*Counsel for Defendant National
Strength & Conditioning
Association*

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2 Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative
3 Policies and Procedures of the United States District Court for the Southern
4 District of California, I certify that the content of this document is acceptable to
5 counsel for the Defendant and that I have obtained authorization from Kenneth S.
6 Kawabata to affix his electronic signature to this document.
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/s/ Paul A. Serritella

Paul A. Serritella

PROOF OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CROSSFIT, INC., v. NATIONAL STRENGTH AND CONDITIONING
ASSOCIATION,

District Court Case No. 14-cv-1191-JLS(KSC)

I, Paul A. Serritella, hereby certify that I am over the age of eighteen and not
a party to the within action; I am employed by Latham & Watkins LLP in the
County of New York at 885 Third Avenue, New York, New York 10022.

On May 14, 2015, I served the document below described as:

SECOND JOINT MOTION TO EXTEND DISCOVERY DATES

The document(s) was/were served by the following means:

- **BY ELECTRONIC TRANSMISSION VIA NEF:** I hereby
certify that I electronically filed the foregoing document(s) with
the Clerk of Court using the CM/ECF system, which sent
Notifications of Electronic Filing to the persons at the e-mail
addresses listed immediately below. Accordingly, pursuant to the
Court's Local Rule 5.4(c), I caused the document(s) to be sent
electronically to the persons listed immediately below.

I declare under penalty of perjury under the laws of United States of
America that the foregoing is true and correct.

Executed on May 14, 2015 at New York, New York.

/s/ Paul A. Serritella

Paul A. Serritella

SERVICE LIST
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CROSSFIT, INC., v. NATIONAL STRENGTH AND CONDITIONING
ASSOCIATION,
District Court Case No. 14-cv-1191-JLS(KSC)

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